In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-328

RICHARD M. PATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States Court of Claims, seeking money damages, back pay and reinstatement to his former position as a Criminal Investigator (GS-12) in the Bureau of Narcotics and Dangerous Drugs of the Department of Justice. The Bureau removed petitioner from federal service in May 1969, pursuant to the provisions of the Lloyd-LaFollette Act, 5 U.S.C. 7501, after sustaining three administrative charges against him involving the transfer of money obtained by law enforcement officers in a narcotics case: (1) unethical use of official authority; (2) submission of false information in connection with the conduct of official business; and (3) unauthorized disclosure of official information (see Pet. App. A-22 to A-23). The Bureau's action was affirmed by the Civil Service Commission on petitioner's administrative appeals (Pet. App. A-3 to A-21). The Court of Claims entered summary judgment for the United States on judicial review (Pet. App. A-1 to A-2).

Petitioner advances a variety of contentions in this Court, challenging the procedures utilized to effect his separation from employment with the Bureau of Narcotics and Dangerous Drugs. These contentions are not well founded, and none of them warrants further review by this Court.

1. Petitioner argues here, as he did below, that his discharge deprived him of procedural rights guaranteed by 28 C.F.R. 47.10 (1969), 5 C.F.R. 771.214 (1969), and the Due Process Clause of the Fifth Amendment, because the person proposing his removal also appointed the Department of Justice hearing examiner and made the initial decision to remove petitioner from federal service.

Petitioner first claims (Pet. 9-10) that this case falls within the ban of 28 C.F.R. 47.10(d) (1969), prohibiting the official making an initial adverse personnel decision from also deciding an administrative appeal within the Department of Justice. The argument is that petitioner's notice of proposed removal should be treated as an initial adverse personnel decision, and the Bureau's initial decision should be treated as a decision on administrative appeal. This claim is not supported by the statute and regulations.

Department of Justice regulations expressly provide that the initial decision to remove a departmental employee from federal service should be made only after a pretermination hearing. Although a pretermination hearing is not required by the statute, the provision of a hearing is a valid exercise of discretion under

the statute.[1] See, *Arnett* v. *Kennedy*, 416 U.S. 134, 224 (dissenting opinion of Mr. Justice Marshall). Accordingly, the notice of proposed removal was just that, and nothing more. It was therefore entirely proper under 28 C.F.R. 47.10(d) for the official issuing that notice to make initial post-hearing removal decision. That procedure is, moreover, constitutionally adequate where, as here, the discharged employee is entitled to receive a later hearing before the Civil Service Commission. *Arnett* v. *Kennedy, supra,* 416 U.S. at 155, n. 21 (plurality opinion of Mr. Justice Rehnquist), and at 170, n. 5 (concurring opinion of Mr. Justice Powell). See also *Nelson* v. *Kleppe,* C.A. 5, No. 73-3337, decided May 28, 1974; *Studemeyer* v. *Macy*, 321 F. 2d 386 (C.A. D.C.), certiorari denied, 375 U.S. 934. Moreover, the Bureau official making the initial adverse personnel decision here had no personal interest in the underlying dispute in petitioner's case. Cf. *Arnett* v. *Kennedy,*

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[1] 5 U.S.C. 7501(b), governing discharge from the competitive civil service, provides in part that "[e]xamination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay." The Civil Service Commission's regulations (5 C.F.R. 771.201 *et seq.* (1969)) state that a tenured employee in the competitive civil service, with exceptions not pertinent here, "is entitled to a hearing on his appeal before a hearing committee" 5 C.F.R. 771.213(a) (1969). The regulations further provide (*ibid.*):

> The hearing may precede either the original decision or the appellate decision, at the agency's option. Only one hearing shall be held unless the agency determines that unusual circumstances require a second hearing.

The Department of Justice, acting pursuant to 5 C.F.R. 771. 213(a) (1969), has promulgated regulations governing the conduct of hearings and providing that "[t]he hearing shall be conducted *prior to a decision on the proposed adverse action* and shall, whenever practicable, be held near the employee's place of work." 28 C.F.R. 47.8(a) (1969) (emphasis added).

supra, 416 U.S. at 198-199 (dissenting opinion of Mr. Justice White). Nor did petitioner request this official to recuse himself or to appoint another officer to act in his place.

2. Petitioner's arguments (Pet. 2-3, 11, 12) attacking the nature of the evidence submitted at the Civil Service Commission hearing, and the absence of a verbatim transcript of the Bureau's pre-termination hearing, were not raised before the Civil Service Commission Board of Appeals and Review. They are, therefore, not appropriately presented to this Court. See, *e.g., Haynes* v. *United States,* 418 F. 2d 1380, 1382-1383 (Ct. Cl.). There is in any event no merit in petitioner's arguments. The decision entered by the Regional Office of the Civil Service Commission, after a hearing, indicates that the Commission carefully considered not only the testimony adduced during the pre-termination hearing before the Bureau, but also the additional evidence which petitioner submitted to the Commission (see Pet. App. A-15 to A-19). Petitioner never requested the Commission to produce witnesses for confrontation or cross-examination, and it was not improper for the Commission to decide petitioner's administrative appeal on the basis of documentary evidence (see, *e.g., Richardson* v. *Perales,* 402 U.S. 389; *DeNigris* v. *United States,* 169 Ct. Cl. 619, 622-623). Furthermore, contrary to petitioner's assertions (Pet. 12), the making of a tape-recording plainly does not constitute an election by the Bureau to prepare a verbatim transcript rather than a written summary of the pre-termination hearing under 5 C.F.R. 771.217 (1969). The Bureau acted properly, under the applicable regulation, in submitting written summaries of the pre-termination hearing to the Commission. See, *e.g., Sullivan* v. *United States,* 416 F. 2d 1277, 1280 (Ct. Cl.).

3. Petitioner's next contention, properly rejected by the court below, is that Inspector Goe's testimony at the pre-termination hearing concerning the contents of 32 documents in the Bureau's files violated evidentiary rules, the procedural guarantees of 5 U.S.C. 7501, 5 C. F.R. 771.215 (1969), 28 C.F.R. 47.7 and 47.8 (1969), and petitioner's constitutional rights of confrontation and cross-examination. The testimony of Inspector Goe related to the charge that petitioner submitted false information in connection with the conduct of official business, by advising state law enforcement officers that one Gregory Taylor was an essential government witness and informant in a number of pending criminal cases and that State criminal narcotics charges against Taylor should therefore be dropped (see Pet. App. A-8 to A-9). Inspector Goe testified that his examination of the Bureau's files showed that Gregory Taylor or Bernice Taylor were listed as informants in only 8 of the 32 cases which petitioner had listed for state officials as cases in which Gregory Taylor had served as a witness or essential informant (see Pet. App. A-8, A-17).

The administrative record shows that the hearing examiner for the Bureau ruled that, if petitioner wished to contest Inspector Goe's testimony concerning the number of cases in which Gregory Taylor or Bernice Taylor was listed as an informant, then the Bureau's files would be produced for the purpose of impeaching Inspector Goe's testimony (CSC admin. file, pp. 130-131).[2] However, petitioner chose not to challenge Inspector Goe's testimony on this point. Thus the Court

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[2]"CSC admin. file" refers to the certified administrative record of proceedings before the Civil Service Commission.

of Claims correctly held that petitioner "failed to cross-examine on this point even when the opportunity to inspect some 32 files in question was provided" (Pet. App. A-2). Since Inspector Goe's testimony was not disputed by petitioner, the Bureau's files were not "pertinent records" within the meaning of 5 C.F.R. 771.215(b) (1969) and 28 C.F.R. 47.8(b) (1969), and there was no constitutional, statutory or regulatory requirement that the files be produced. The Justice Department's governing regulations, 28 C.F.R. 47.8(c) (1969), do not require adherence to the rules of evidence in pre-termination hearings. In particular, hearsay evidence has long been admissible in administrative proceedings. See, *e.g., Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197; *Richardson* v. *Perales,* 402 U.S. 389.

4. Petitioner maintains finally (Pet. 3) that his removal from federal service was arbitrary and capricious and not supported by sufficient evidence. The written decisions of the Bureau and the Civil Service Commission, upon which we rely, show that there is no merit in this purely factual contention (see Pet. App. A-3 to A-23).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.